No. 12227

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a Corporation, *Appellant*

vs.

CECELIA J. WILSON, *Respondent*

APPELLANT'S PETITION FOR REHEARING

On Appeal from the United States District Court for the District of Idaho, Eastern Division

HON. CHASE A. CLARK, *Judge*

J. L. EBERLE,
B. S. VARIAN,
DALE O. MORGAN,
T. H. EBERLE,
Boise, Idaho,

Attorneys for Appellant.

Filed .....

....., Clerk

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SUBJECT INDEX

TABLE OF CASES AND STATUTES

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APPELLANT'S PETITION FOR REHEARING

Appellant respectfully petitions this Honorable Court to grant a rehearing in this cause for the reason that it appears from the opinion filed herein on November 21, 1949:

(a) That there is no basis for the implications, and reflection upon the Supreme Court of Idaho, contained in the statement in the opinion that "the Idaho Court must almost certainly be counted because of its uniform emphasis of a rule of interpretation favorably, whenever permissible, to recovery" against an insurance company.

(b) That the Court must have overlooked the fact that the Supreme Court of Idaho has never approved, insofar as the principles of law are concerned for which this Court cited in its opinion the Browning case, which is without precedent and has never been cited or quoted for such principles by any court in any state, and as to such purported principles has been overruled.

(c) That the rule in Idaho under its Workmen's Compensation Law, as applied in the opinion to determine accident per se, is not the law of Idaho as applicable to the construction of insurance policies, and the result of the application of such Workmen's Compensation Law, as in the opinion set forth, can only result in thwarting the terms and general object of insurance policies.

(d) That the opinion shows the Court apparently brushed aside the established rules of this Court and the majority of all other courts by merely referring to the snoring and coughing being connected with the sedative as an unforseeable result therefrom and without even discussing the facts to which a major portion of the briefs were directed, and particularly the testimony of the two doctors, upon which evidence the opinion relies, who testified, without contradiction, that there was no connection between the sedative and the snoring and coughing because the sedative merely produced sleep and whenever asleep, however induced, the actions of the insured were the same, all of which actions were not only foreseeable, but known to the insured as well as to the doctor.

(e) That the legal principles assigned as supporting the opinion are neither the law of the State of Idaho nor applicable to the facts in the case at bar.

(f) That the testimony of the expert witnesses was apparently ignored and the medical opinion of the Court substituted therefor.

(g) That after a further exhaustive investigation, we are convinced that the opinion is without supporting authority and goes so far beyond any rule or doctrine here-

tofore announced by the Supreme Court of Idaho or the great weight of authority in other jurisdictions, that it should, in our opinion, be reviewed and considered further before it is finally announced as the decision of this Court.

ERROR No. 1

The Law of Idaho

Astounding were the following references in the opinion to the Utah case of Browning v. Equitable Life Assur. Society, 94 Utah 532, 72 P. (2d) 1060:

> "The situation of pre-existing disease dealt with in Browning v. Equitable Life Society, supra, has already been sufficiently described; and *the approval several times given that decision by the Idaho court carries a significance we are not justified in ignoring.*" (Emphasis ours). (Page 7).

Commenting upon the Idaho case, Rauert v. Loyal Protective Ins. Co., 61 Idaho 677, 106 P. (2d) 1015, the opinion (p. 4) states:

> "In its opinion the court (Idaho) cited with approval Browning v. Equitable Life Assur. Soc., 94 Utah 532(4)." * * * * (Footnote 4). Similarly in O'Neil v. New York Life Ins. Co., 65 Idaho 722, 152 P. (2d) 707, hereafter discussed, *"the Browning case was strongly relied on."* (Emphasis ours).

ARGUMENT:

The law for which the Court cites the Browning case has never been the law of Idaho, and we earnestly trust it never will be as long as the Court has any regard for contracts and its heritage.

It is respectfully submitted that the holding in the Browning case has never been approved by the Idaho court; that the Browning case has been criticized and overruled by the Utah court; that the problem presented herein by the undisputed facts in the record is not analogous to the facts before the appellate court in the Browning case and that it has never been followed by any other court.

The Browning case was first cited in Rauert v. Loyal Protective Assurance Co., 61 Ida. 677, 106 P. (2d) 1015, 1018. Reference was made to certain language in the Browning opinion relating to the rule that insurance policies are to be liberally construed in favor of the insured. The language quoted from the Browning case is a statement of the rule of construction long adhered to in Idaho, as is shown in the paragraph following the language quoted from the Browning case, in the Rauert opinion, p. 1018:

> "This court, like the Utah Supreme Court (Browning v. Equitable Life Assurance Society, supra), is committed to the rule of liberal construction of insurance policies. In Sweaney & Smith Co. v. St. Paul, etc., Insurance Co., 35 Idaho 303, 315, 316, 206 P. 178, 182, we held that a 'clause in an insurance policy being susceptible of more than one construction, the one most favorable to the insured will be adopted (citing cases).' Contracts of insurance should be considered in view of their general objects and the conditions prescribed by the insurers, rather than on the basis of a strict technical interpretation. The rule of liberal construction was adhered to in Sant. v. Continental Life Insurance Company, 49 Idaho 691, 291 P. 1072; Maryland Casualty Company

v. Boise Street Car Company, 52 Idaho 133, 11 P. (2d) 1090; Watkins v. Federal Life Insurance Company, 54 Idaho 174; 29 P. (2d) 1007; Kingsford v. Business Men's Assurance Company, 57 Idaho 727, 68 P. (2d) 58."

It is clearly apparent that the incorporation of the statement of the rule of liberal construction was neither a reliance upon the Browning case, nor an approval of the law for which it is cited in the opinion. Further, the statement to which reference was made, neither added to nor changed the Idaho law.

Reference is made to the same language noted herein from the Browning case in the Idaho case of Rollefson v. Lutheran Brotherhood, 64 Ida. 331, 132 P. (2d) 758, 762. The language is contained in a comment upon the Rauert case as approving the rule of liberal construction in connection with construction of a disability provision in the policy then under consideration—a problem not now under consideration. Likewise, the case of O'Neil v. New York Life Ins. Co., 65 Idaho 722, 152 P. (2d) 707, 710, again cites the Rauert case and includes the same quotation from the Browning case for the proposition of liberal construction. But there is no language contained in the O'Neil case from which it can be inferred that the Idaho court either approved or relied upon the holding of the Browning case. The Browning case has been severely criticized by the Utah court, Lee v. New York Life Ins. Co., 95 Utah 445, 82 P. (2d) 178, 180:

"I think such holding (Browning) is without precedent in the United States. It seems difficult to conceive of any case where there may be any inter-

> action of the results of an injury and the results of some other independent cause regardless of how paramount, efficient of concurring the other independent cause may be in producing the death or incapacity which, under that holding, would not be covered by the policy. The only case which would apparently not be covered by the policy would be where the course of the chain leading from the injury and the course of the chain leading from the other cause, be it a disease, toxemia, infection, or what not, were shown to be entirely separated without any interaction one with the other. Certainly, under the Browning case, which I think is beyond the outside circle of liability arising from any reasonable construction of the policy, this case must be decided against the insurer."

Further, the Browning case appears to have been overruled by the Utah Court in a later case, Tucker v. New York Life Ins. Co., 107 Utah 478, 155 P. (2d) 173, 177:

> "In this case the accident set in motion forces (increased blood pressure) which, working on a pathological condition, caused death. Certainly if recovery is not allowed in this case because the injury did not cause the death independently of the disease, recovery should not for stronger reasons have been allowed in the Browning case. *Therefore, I think the holding in this case must overrule the Browning case."* (Emphasis ours).

In the Tucker case it appears that the same policy provisions as involved herein were present. The facts in that case, as herein, were not in dispute. The insured accidently slipped and fell on an icy sidewalk sustaining a fractured arm. The *undisputed* medical testimony ac-

cording to the plaintiff's own doctors showed that the insured had been suffering from high blood pressure for at least a year prior to his fall. The fall caused the breaking of an aneurism of the aorta which resulted in death. Upon this undisputed evidence the court held (p. 176):

> "Mr. Nichol's condition at the time of the accident was one in which he had an existing disease which cooperated with the accident in causing his death. *This compels us to conclude that the accident cannot be considered the sole cause of insured's death, and from this factual picture we must conclude that this case is one which falls within the third class of cases as set forth in Mr. Justice Larson's opinion in Browning v. Equitable Life Assur. Society, supra, and the cases there cited.*" (Emphasis ours).

The pertinent part of the classification of cases to which the court referred in the Browning case is quoted on page 175 of the opinion in the Tucker case then under consideration (155 P. (2d) 173):

> "(3) When at the time of the accident, *there was an existing disease* which, cooperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause, or as the cause indepndent of all other causes. (Citing cases)."

As pointed out in the opinion in the instant case, the Browning case was originally considered (72 P. (2d) 1060) without being aware of the "exclusion clause" (page 4). Upon rehearing (80 P. (2d) 348) the exclusion clause was for the first time considered, but the Court justified the previous holding upon the ground that the record did not show evidence of a pre-existing disease of

infirmity. Had the court found such evidence, the holding would of necessity been for reversal under the court's own statement of the law governing the case. (80 P. (2d) 353):

> "We have again read the record through a number of times to see if there was any evidence that the insured was suffering from disease, bodily infirmity or bacterial infection, within the meaning of such terms, when used in exception clauses of accident insurance policies, such as this, *and we unhesitatingly say that there is no evidence to that effect.*" (Emphasis ours).

However, when the exclusion clause for the first time was considered on petition for rehearing, Chief Justice Folland, who had concurred in the original opinion, added his dissent to that of Mr. Justice Wolfe, making the holding a three to two decision. But in any event, it is clearly shown by the Tucker case, supra, that when the Utah court is confronted with undisputed evidence that the insured at the time of the accident had a pre-existing disease or bodily infirmity which cooperates with the accident to produce the injury or death, there can be no recovery under the double indemnity clause of an insurance policy containing the above noted exception or inclusion clause.

In other words, in the Tucker case, an artery, called the aorta, had a dilation filled with blood which is called an aneurism. The insured fell, fractured his arm, and because of the increased blood pressure the aneurism broke loose, resulting in death. Although the insured had high blood pressure, the court based its opinion upon the following quotation: "The court finds that an aneurism is a disease as a matter of law, and that a death from the

rupture of the aneurism of the abdominal aorta is a death which resulted directly from bodily infirmity or disease." In other words, the aneurism which is a dialation of an artery containing blood, was a diseased condition of the artery, just as a thrombosis was a diseased condition of the venous system. A fall causing the rupture of the artery, releasing the blood sac, resulting in death, is certainly no more of a bodily infirmity than a thrombosis which as a result of any force is broken so that a part thereof is released, resulting in death. As repeatedly pointed out in our briefs, there is no contradiction nor dispute in the medical testimony that thrombosis is a venous disease and that anybody with thrombosis has a diseased condition. So, likewise, there is no dispute nor contradiction in the testimony of all of the experts that thrombosis is a bodily infirmity. In fact, the very doctor upon whose evidence the opinion relies, testified that the embolism was caused by thrombosis. (t. 138).

The opinion states that "except for this mishap (insured) might have lived out his days and died of old age" (page 5). This certainly was not taken from the record or from any Idaho case. Presumably this doctrine was also adopted from the Browning case. In the Tucker case, except for the strain of the accident, certainly the insured would have had a greater expectancy of life with the aneurism than the insured in the case at bar with his thrombosis, which the two doctors, upon whom the opinion so strongly relies, testified without dispute might have broken loose at any time with even a slight effort,

slight cough, even sitting in a chair or taking an enema, all of which has been fully discussed in our briefs.

While it is immaterial since the law attributed to the Browning case was not referred to by the Idaho court, it is noted that any reference in Idaho decisions to the Browning case, was made to the original opinion where the exception clause was not considered and not to the case on petition for rehearing where such clause was first before the court. It is further noted that the opinion on petition for rehearing in the Browning case (80 P. (2d) 348, 351) gave some weight to the fact that the language in the exception clause in that policy employed the word "caused". In the policy now under consideration, the exception is directed to non-coverage of losses which "resulted "directly or indirectly from bodily infirmity or disease. Not only has the Browning case not been approved by the Idaho Court, but counsels' research fails to find any court other than the court of origin which has approved or relied upon the holding therein.

The opinion also refers to the case of Watkins v. Federal Life Insurance Company, 54 Idaho 174, 29 P. (2d) 1007, as sustaining the rule for allowing recovery against an insurance company wherever "permissible". Neither court nor counsel can find anything in this case to so imply. It was certainly a question of fact as to whether the object which struck the insured's eye was put in motion by the accident which wrecked the wagon. It was certainly a reasonable inference from the undisputed testimony that the object destroying the eye came from, or was set in motion by, the wreck.

The intimation in the opinion that it is impossible to ascertain just what the Idaho court meant and what cases it relied upon in arriving at its decision in the case of O'Neil v. New York Life Ins. Co., 65 Ida. 722, 152 P. (2d) 707, 722, is apparently also made in support of the purported rule of construction of the Idaho Court. The fact is that the court reversed the case for errors in three instructions, two of them pertaining to the definition of an accident, which is in line with the prior holdings of the court, and the third, which stated that the burden was upon the company to prove its affirmative defenses that the death of the insured, O'Neil, occurred within one of the exceptions contained in the policy and which the trial court refused to give. The case was sent back for retrial, and there is certainly nothing unsound about the court's statement that "it is not consistent with the experience of the average man that one who enters into a brawl with his bare hands does so with the expectation that it may result fatally, if he has no reason to believe that his antagonist is armed". This is in line with the great majority of cases, and as pointed out in Bornerman v. John Hancock Mutual Life, 289 N.Y. 295, 45 N.E. (2d) 452, where the altercation was such that serious results might be foreseeable and knockout blows could be expected, it could not be said that serious injuries were not foreseen or unexpected.

In the case of Wheeler v. Fidelity & Casualty Co., 298 Mo. 645, 251 S.W. 924, cited by the court in its opinion (page 5) we should call the court's attention to the fact there was only an insuring clause and no exclusion clause. There was a conflict in the evidence. The medical testimony made the conclusion possible that the thrombus was

caused by the eye trouble and the court said "it is highly probable, therefore, that the thrombus effecting the death in this case was caused by the "infection from the eye".

The opinion also cites, in support of its decision, the case of Rauert v. Loyal Protective Ins. Co., 61 Idaho 677, 106 P. (2d) 1015. One of the issues in this case was the question of a pre-existing disease. As a result of an operation adhesions had formed a fibrous ring on the abdominal wall. Under the rule as laid down by this Court, purporting to be the law of Idaho, it would not have been necessary for the court to even discuss disease as a cause of the accident. The court certainly would have had occasion to lay down the same principles as laid down by this court in its opinion, and for which it cites the Idaho cases.

The fact is that the Idaho court in the Rauert case did consider disease as a valid defense and discussed it. The Court said:

> "While Dr. Stewart answered the leading question: "Q. This opening and ring that you spoke of was a diseased condition of the body" - "A. Yes, it was an adhesion, or an old adhesion, that happened to have a hole through it", it is not clear whether he intended to testify that the fibrous ring was in fact a disease or simply an adhesion. And it will be noted that neither Dr. Stewart nor Dr. Chaloupka used the word 'disease'. However, Dr. Woodward testified that he 'would not call it disease;' in other words, that it was not a disease. The jury found against appellant and under the well settled rule its verdict will not be disturbed."

If the law of Idaho is as stated by this court in its opinion to be, why didn't the Idaho court so hold?

Why did it say that this defense was a question of fact? Why did it discuss the fact that there was a conflict in the evidence as to disease? There is nothing in this case, nor any other Idaho case, to support the principles of law attributed to the Idaho court in the opinion of this court, nor to apply to the Idaho court the principles of law attributed to the Utah court in the Browning case, which, as heretofore mentioned, as far as we can find, had never been quoted or cited by any other court in any other jurisdiction, and as heretofore pointed out, is not the law of Utah.

ERROR No. 2

Workmen's Compensation Law Inapplicable

On Page 3 of the opinion, the court discusses the case of Teater v. Dairymen's Cooperative Creamery, 68 Idaho 152, 190 P. (2d) 687, applies the principles thereof and the Workmen's Compensation Law of Idaho and states that it is of value in considering what is accident, per se:

ARGUMENT:

The purpose of the Workmen's Compensation Law is that "sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy". (Sec. 72, 102 Idaho Code).

Although workmen's compensation is not in the nature of health insurance, injuries in the course of the employment resulting from the exertions of the employee, are

certainly held to be covered. In the Teater case the court said "that it was the work that Teater was doing at the time of his death which caused an accident accelerating the diseased condition of his heart".

This is in line with the court's decision in Wade v. Pacific Coast Elevator Co., 64 Idaho 176, 129 P. (2d) 894, where the employee likewise died of heart difficulty but compensation was denied because the board "evidently did did not believe, or choose to adopt, the opinions of those experts who said it was probable or possible that death resulted from the exertions of the employee on the date of his death".

As illustrating "accident" under the Workmen's Compensation Law, consisting of exertion in the scope of the employment, the Larson case, 48 Idaho 136, 279 Pac. 1087, involved an aneurism similar to the Tucker case, heretofore mentioned. The question was whether the aneurism spread further than it had been before, or resulted from a breaking away from the aneurism entering the bloodstream and causing an embolism. The court said:

> "It therefore seems clear that as a result of the work being performed by the deceased the latent physical defect, the aneurism, was accelerated or aggravated and progressed farther, causing death. The strain may not have been unusual, and even slight, but if it caused the death of the deceased it was an accident that is compensable. (Pace v. North Dakota, supra; Knock v. Industrial Acc. Com., supra; Patrick v. J. B. Ham Co., 119 Me. 510, 111 Atl. 912, 13 A.L.R. 427; Peoria Ry. Co. v. Industrial Acc. Board, 279 Ill. 352, 116 N.E. 651; Pisko v. Nelson, 4 N.J. Misc. 154, 132 Atl. 301; Smith v. Primrose

Tapestry Co., 285 Pa. 145, 131 Atl. 703; Cole v. Department of Labor and Industries, supra)."

Moreover, although the statutes specifically provide for the splitting of benefits in the case of disability where there is pre-existing infirmity, this does not apply to a death case. In Bishop v. Morrison-Knudsen Co., 64 Idaho 806, 137 P. (2d) 963, the court said:

> "This is a death case; which, being true, Section 43-1123 I.C.A., amended by Session Laws, 1941, Chapter 155, page 310, has no application. Said amendment is limited to disability resulting from an accident, and so far as material here is as follows:
>
> "43-1123. Deductions for pre-existing injuries and infirmities. —****
>
> "(a) If the degree or duration of disability resulting from an accident is increased or prolonged because of a pre-existing injury or infirmity the employer shall be liable only for the additional disability resulting from such accident. * * * *"
>
> "The above provision, no doubt, was copied from Title 26, §288, Code of Alabama, 1940, formerly Section 7561 of the Alabama Code, 1923, in which the following provision will be found: 'If the degree or duration of disability resulting from an accident is increased or prolonged because of a pre-existing injury or infirmity, the employer shall be liable only for the disability that would have resulted from the accident had the earlier injury or infirmity not existed."

As pointed out in the Teater case, there is no standard of fitness provided for in Idaho Workmen's Compensation Law, and pre-existing disease or infirmity is immater-

ial in a death case as long as it resulted from exertion during the course of employment.

We know of no court that has ever adopted the decisions carrying out the general purposes of workmen's compensation laws to the construction of insurance policies.

ERROR No. 3

Knowledge of Insured and Physician

The opinion states that the embolus was produced by the extraordinarily violent snoring, coughing, and choking, resulting unforeseeably from the administration of sedatives incident to the operation (p. 1); that Drs. Call and Brothers performed or aided in the operation; that no autopsy was performed (p. 2) although insurer was given opportunity, and the case of Jensma v. Sun Life Assur. Co., 64 F. (2d) 457 supports the court's position as to accident. (P. 3).

ARGUMENT:

Perhaps we should first call the court's attention to the fact that the statement in the opinion "the equally reputable and eminent surgeons who performed or aided in the operation" is not in accordance with the record, because only Dr. Call attended the insured and Dr. Brothers was merely an expert witness, as were Drs. Stewart, Pittenger, Swindell, Beeman and Groves, even though the court apparently feels that Dr. Brothers should be singled out from these expert witnesses and his testimony accepted, although he did not have anything more to do with the operation or the patient than the other expert witnesses.

The court adopted the testimony of the insured's physician that the embolus was caused by a pre-existing thrombus for the reasons stated in such testimony. Therefore, the origin of the embolus having been ascertained there was no need for an autopsy, and such post-mortem examination would have added nothing to the facts herein.

Assuming respondent's theory that the thrombus resulted from a prior operation, there is no conflict in the testimony that both the insured and his attending physician and friend knew that when the insured slept he was a pronounced snorer and that sleeping always had the same effect upon him, however induced. As pointed out in our briefs, when the nurse called the doctor's attention to his snoring and actions, the doctor assured her that it was normal with the patient. It was also pointed out at length that by the admission of his own doctor, insured acted, subsequent to the operation, as he would have in ordinary life if asleep.

Thus, while the respondent's medical witness stated it was his opinion that the sedative caused the snoring and coughing, the facts brought out on cross-examination of the same witness, conclusively show that the sedative did not cause the coughing and snoring. *And upon the facts, not the opinion of the witness, there was no accident caused by external means.* And regardless of whether or not it might be found that the snoring and coughing caused the embolus to break off from the pre-existing thrombus such accident is not within the coverage provided by the policy.

The attending physician did say that the death was un-

expected. However, as pointed out in our briefs at length, such a statement was a general one and the doctor thereupon testified to the actual facts. His testimony is uncontradicted and undisputed, that both he and the insured knew that whenever he slept he always snored and that his actions were "no different than in ordinary life; a snorer does the same thing without an opiate". (t. 115). The excerpts from the record relating to the facts as to the knowledge of both doctor and insured are quoted at length in our prior briefs. Although much of these briefs is devoted to this question, the only reference in the opinion seems to be that the embolism resulted unforseeably from the sedative.

No reference is made to the arguments contained in the briefs that there was no connection between the sedative and the snoring. The sedative merely produced sleep, and when he slept, no matter how induced, his actions were always the same. This was known to both doctor and insured. How, then, could it have been unexpected?

As above noted, reference is made to the Jensma case to support the holding of this court. The reason the result was unexpected in the Jensma case was because of the idiosyncrasy or hyper-susceptibility of the patient in that case. However, it was definitely stated by this court that such peculiarity or idiosyncrasy was "unknown to himself (patient) and the operating physician". In the case at bar, everything that occurred was admitted by the operating physician to have been known to him, and yet the court makes no effort to even discuss the basis upon which the case at bar can be brought within the Jensma case.

The ruling in the Jensma case follows the majority of the cases, most of which contain this quotation "it is true that the doctor intended to apply the drug, and insured intended that he should apply it; but neither intended to apply it to a body possessed of the idiosyncrasy. Death resulted because of their applying the drug in ignorance of this peculiarity in the object acted upon, and was a result not calculated or intended, and one which could not reasonably have been foreseen". No case can be found to sustain the provision that where neither the insured nor the physician was ignorant of the peculiarity the result was accidental, nor can the general statement that the death was accidental and unexpected be accepted by a court where the same is a mere conclusion of the doctor, when the facts to which he testified clearly show that he knew exactly how the patient would react when asleep, regardless of how such sleep was induced.

ERROR No. 4

Proximate Cause

The majority opinion (p. 4) in attempting to apply the rule of proximate cause to the case at bar, applies the law of negligence and disregards the exception clause of the policy under consideration and its effect upon any possible use of the rule of proximate cause herein. The following language is from the majority opinion, p. 4;

> "Discussing an insuring clause identical with the one now being considered the Utah court (Browning case) observed that it was 'not required to search beyond the proximate, efficient, and inducing cause to see if there may be latent causes.' It held that the

> insured's proof fulfilled the policy conditions and that indemnity was payable for the full term of the disability. Consult the same case on petition for rehearing, 80 P. (2d) 348 where policy exclusions comparable with the present were noticed and held not to preclude recovery."

ARGUMENT:

When the full pertinent reference is read, it is apparent that the discussion of proximate cause was made assuming that the policy did not contain an exception clause.

> "The policy before us does not provide that recovery shall be had only if no other circumstance than the accident contributes to the disability either proximately or remotely, directly or indirectly, wholly or in part. We are not required to search beyond the proximate, efficient, and inducing cause to see if there may be latent causes." (Browning case, 72 P. (2d) 1060, 1076).

On petition for rehearing the exception clause was called to the court's attention. The affirmance of the original opinion was made, not on the ground that the rule of proximate cause governed where the policy contained the exception clause, but upon the ground that there was no evidence that the insured was suffering from a pre-existing disease which cooperated with the accidental injury to produce the disability. As previously pointed out herein, any other holding would have been contrary to the law governing the case as announced by the court in its original opinion.

> "We have again read the record through a number of times to see if there was any evidence that the in-

sured was suffering from disease, bodily infirmity or bacterial infection, within the meaning of such terms, when used in exception clauses of accident insurance policies such as this, and we unhesitatingly say that there is no evidence to that effect." (80 P. (2d) 348, 353 Browning case on peittion for rehearing).

It has been held almost without exception that where the policy contains an exclusion clause in addition to the insuring clause, the rule of proximate cause has no application in determining liability under the exception clause. The application of this rule is shown in the recent Washington case of Evans v. Metropolitan Life Ins. Co., 26 Wash. (2d) 594, 174 P. (2d) 961, 977:

"The evidence of the doctors, the pertinent portions of which are set out in this opinion, was to the effect that the condition of the insured's heart contributed to his death. The term "proximate cause" has no application in ascertaining liability upon policies which contain clauses relieving the insurance companies from liability in cases where death is caused or contributed to directly, or indirectly, or wholly or partially, by disease, and the evidence showed that the disease contributed to the death. Where the liability of the insurance company is so restricted it is not sufficient for a beneficiary to establish a direct causal connection between the accident and the injury. He is compelled to show that the resultant condition was caused solely by accidental means; and if the proof shows a pre-existing infirmity which was a contributing factor, he cannot recover. *This holding is dictated by the express terms of the contracts under consideration.*" (Emphasis ours).

See also the case of Russell v. Glens Falls Indemnity Co., 134 Neb. 631, 279 N.W. 287, where the court said: "It seems reasonably clear that a policy with the phrase 'resulting directly, independently and exclusively' refers to the efficient, substantial and proximate cause of the disability at the time it occurred. On the other hand, a policy which also has the phrase 'wholly or partly, directly or indirectly, from disease or mental or bodily infirmity' refers to another contributory cause, whether proximate or remote."

The following cases support this rule, many of which were cited in appellant's previous briefs. Our research has found substantial no authority to the contrary:

Evans v. Metropolitan Life Ins. Co.,
26 Wash. (2d) 594,
174 P. (2d) 961;

Liberty Nat. Life Ins. Co. v. Bailey,
—— Ala. ——,
38 So. (2d) 295;

Sullivan v. Metropolitan Life Ins. Co.,
96 Mont. 254,
29 P. (2d) 1046;

Kingsland v. Metropolitan Life Ins. Co.,
97 Mont. 558,
37 P. (2d) 335;

Federal Life Ins. Co. v. Firestone,
159 Okla. 228,
15 P. (2d) 141;

Great Northern Life Ins. Co. v. Farmers Union Co-Operative Gin Co.,
181 Okla. 228,
73 P. (2d) 1155;

Kellner v. Travelers' Ins. Co.,
180 Cal. 326,
181 P. 61;

Bouchard v. Prudential Ins. Co.,
135 Me. 238,
194 A. 405;

O'Meara v. Columbian Nat. Life Ins. Co.,
119 Conn. 641,
178 A. 357;

Clark v. Employers' Liability Assur. Co.,
72 Vt. 458,
48 A. 639;

Runyon v. Commonwealth Casualty Co.,
109 N.J.L. 238,
160 A. 402;

Korff v. Travelers' Ins. Co.
83 F. (2d) 45;

Sharpe v. Com. Trav. Mut. Acc. Ass'n.,
139 Ind. 92,
37 N.E. 353;

Hubbard v. Travelers' Ins. Co.,
98 F. 932;

Carr v. Pac. Mut. Life Ins. Co.,
100 Mo. App. 602,
75 S.W. 180;

White v. Standard Life & Accid. Ins. Co.,
95 Minn. 77,
103 N.W. 735;

Nat'l. Masonic Acc. Ass'n. of Des Moines v. Shryock,
73 F. 774;

Stanton v. Travelers' Ins. Co.
83 Conn. 708,
78 A. 317;

Comm. Travelers' Mut. Acc. Ass'n. v. Fulton,
79 F. 423;

Leland v. Order of United Comm. Travelers,
233 Mass. 558,
124 N.E. 517;

First Natl. Bk. of Birmingham v. Equit. Life,
Assur. Soc.,
225 Ala. 586,
144 So. 451;

Mutual Life Ins. Co. v. Hess,
161 F. (2d) 1;

Standard Accid. Ins. Co. v. Hoehn,
215 Ala. 109,
110 So. 7;

Fid. & Cas. Co. v. Meyer,
106 Ark. 91,
152 S.W. 995;

The reasoning and application of this rule is firmly grounded upon the duty of the courts to construe the exception of exclusion provisions of an insurance contract as well as the general insuring clause, as is noted in Bouchard v. Prudential Ins. Co., 135 Me. 238, 194 A. 405, 407;

> "It is argued by plaintiff's counsel that the encounter was the proximate cause; but in this action, founded upon this specific promise, (exception clause), it is not a question of what was the proximate cause of deceased's death. The contract itself clearly creates liability only when death results from

bodily injuries effected solely through accidental means. * ** * *Quite true it is that very often different forces and conditions concur in producing a result that it is not necessary to go farther back in the line of causation than to find the active, efficient, procuring cause known as the proximate cause. In the instant case the blows might well have been said not permit recovery under the language of this policy, that cause, although proximate, being accompanied by another contributing cause, the diseased heart. ** *** So, when the death is attributable directly or indirectly to disease in any form, not occasioned by the accident, recovery may not be had on a policy containing this paritcular promise, even though the accident is the active, efficient, procuring cause."

Examination of the cases which seem to be to the contrary clearly indicates that a body weakness is involved and the courts have referred to the same as a condition. For example, in the case of Driskell v. U. S. Health & Accident Co., 117 Mo. App. 362, 93 S.W. 880, the court said: "In such case, disease and low vitality do not arise to the dignity of concurring causes, but, in having deprived nature of her normal power of resistance to attack, appear rather as the passive allies of the agencies set in motion by the injury."

So, likewise, in Runyon v. Commonwealth Cas. Co., 109 N.J.L. 238, 160 A. 402, the court found: "There was a reduction in the power of the body at the time of the fracture to resist the shock" and said: "It was the direct result of the accident, which might or might not have been fatal had not the bodily vitality been impaired".

In Silverman v. Metropolitan Life Ins. Co., 254 N.Y. 81, 171 N.E. 914, the court again said that where there was merely a "frail, general condition", there may be recovery.

Certainly in the case at bar, the thrombosis cannot be said to be merely a lowering of the vitality of the insured, but definitely a cooperating cause, because there is no conflict in the testimony, including the insured's family physician, that the insured was suffering from thrombosis which caused an embolism. Respondent's witnesses testified to the thrombosis and the diseased venous system as being a bodily infirmity. Almost without exception, the courts have held that bodily infirmity or disease have a well settled meaning as understood by the medical profession. The words "bodily infirmiity or disease" are frequently used in policies of insurance and have a well-understood meaning. They are construed to be practically synonymous, and to refer only to an ailment or disease of a settled character. I.C.J. 452; 4 Cooley's Briefs on Ins. p. 3198; Meyer v. Fidelity & C. Co., 96 Iowa 378, 59 Am. St. Rep. 374, 65 N.W. 328; Manufacturers' Acci. Indemnity Co. v. Dorgan (C.C.A. 6th) 22 L.R.A. 620, 7 C.C.A. 581, 16 U. S. App. 290, 58 Fed. 945. Certainly the facts in this case bring it within this rule. No authority is needed to show that a court may not disregard undisputed evidence which conclusively brings the factual situation within the exceptions of an insurance policy. Neither is the court at liberty to fail to give heed to such exception clause as is well said in the recent case of Mutual Life Ins. Co. v. Hess, 161 F. (2d) 1, 14:

> "Applying to these facts the words of the policy, if water involuntarily entered his lungs, preventing

breathing, which is the usual case of drowning, there would be a 'bodily injury', and the entry of the water would be an 'external' and violent means' within the policy terms, and since death followed in sixty days with nothing to suggest suicide, there would be a case made but for the words 'solely', 'independently of all other causes', and 'not directly or indirectly from bodily infirmity or disease'. *These words cannot be thrown away. They limit the coverage of the insurance. A court can no more extend the coverage than it can increase the amount of the insurance. Deliberately to do either would be a sort of judicial larceny.* Here the evidence points very strongly to another cause of death, a bodily infirmity or disease, active and threatening, adequate to produce death by itself, and likely to cooperate with the water in causing it." (Emphasis ours).

How else would a litigant prove the existence of a bodily infirmity or disease? Or that the same caused the embolism, excepting by medical testimony? An examination of many of the cases shows that there is often a conflict between the expert witnesses as to whether a contributing cause, or causes, constitute bodily infirmity or disease. Here, there is no conflict in the testimony in this regard. Certainly respondent showed that the thrombus had existed for a substantial period of time as the residue of a prior operation, and that it was a bodily infirmity of a settled and determined character. Respondent's witnesses also testified that such pre-existing infirmity cooperated directly, or indirectly, resulting in the death of the insured. As heretofore noted, respondent herself proved not only that insured and his physician knew the condition of the insured at the time of the operation, his habits, and his ac-

tions when asleep, and that he had a pre-existing bodily infirmity and disease which might cause death with even a slight cough at any time.

We have endeavored to analyze the Browning, Idaho, and other cases cited in the opinion. Even the cases referred to in the A.L.R. citation (108 A.L.R. 1, p. 21, opinion p. 4) are not contrary to the principles of law urged by us in our briefs. These cases, and in the subsequent annotations, are readily distinguishable, either by the terms of the policy or the facts involved; some include coverage if the accident is "the proximate cause of the loss", which of course changes the contractural relationship; some are distinguished by the fact that the court or jury was presented with conflicting evidence as to the cause of the loss; some did not include the exclusion clause; none indicated a rule contrary to those heretofore urged as controlling in the instant case; none appeared to permit the court to disregard undisputed evidence to prevent the case from being brought within the exclusion clauses of the policy.

There is nothing in the Idaho law, and this court has not cited any Idaho statute or case, to require this court to apply Workmen's Compensation Laws, or the laws of negligence to the construction of insurance contracts, or to require a construction thereof to the end that recovery be "permissible" despite the uncontradicted evidence and the principles of law heretofore announced by this court and the vast majority of other well reasoned cases; nor is there anything in the Idaho law to require this court to reverse the rule applied by it in the Jensma case and designate a

an accident or unexpected, that of which neither insured nor his physician were ignorant, nor to ignore the testimony of all medical witnesses that the pre-existing disease and infirmity was a cooperating cause.

This court has not, to our knowledge, heretofore announced principles governing insurance contracts such as indicated in its opinion herein, nor brushed aside the uncontradicted testimony of bodily infirmity, knowledge of peculiarity of actions during sleep exactly identical with ordinary life whether sleep was induced by sedative or otherwise, thrombosis causing embolism, and the settled and determined bodily infirmity or disease as a cooperating cause. The opinion can only be explained on the basis of making what the court attributed to the Browning case, the law of Idaho, and the assumption that the Supreme Court of Idaho allowed recovery against insurance companies wherever permissible. Such premises cannot be sustained as we have heretofore pointed out, and a rehearing should be granted.

Respectfully submitted,

J. L. EBERLE,
B. S. VARIAN,
DALE O. MORGAN,
T. H. EBERLE,
Attorneys for Appellant,
Residence: Boise, Idaho.

I hereby certify that in my judgment the foregoing Petition for Rehearing is well founded, and that it is not interposed for delay.

Attorney for Appellants